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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  JAMALL S BAKER,

NO. 3:22-cv-05584-DGE-SKV

12                  Plaintiff,

ORDER ADOPTING REPORT AND  
RECOMMENDATION

v.

13                  JEREMY SEELEY, et. al.,

14                  Defendants.

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16                  This matter comes before the Court on the Report and Recommendation (R&R) of the  
17 Honorable S. Kate Vaughan, United States Magistrate Judge (Dkt. No. 19) and Plaintiff Jamall  
18 Baker's objections to the R&R (Dkt. No. 21). The Court agrees with the R&R but addresses  
19 Plaintiff's objections below.

20                  **I. PLAINTIFF'S OBJECTIONS**

21                  Plaintiff objects to the R&R "in entirety" and argues "[i]t appears from the record that the  
22 [United States Magistrate Judge] has not at all considered Mr. Baker's affidavit which clearly  
23 states that there is a material fact in dispute." (Dkt. No. 21 at 2.) Plaintiff argues he believed  
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1 Defendant Seeley threats and his “state of mind was subjective, a feeling that should not be ruled  
 2 on [at summary judgment].” (*Id.*)

3 In response, Defendants argue “[a]lthough threats or intimidation can make a grievance  
 4 procedure unavailable, [Plaintiff] bore the burden of producing facts showing he believed the  
 5 alleged threats” and the “facts in the record make his allegations frankly implausible.” (Dkt. No.  
 6 22 at 2) (citing *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015) (“[The plaintiff must  
 7 “provide a basis for the court to find that he actually believed prison officials would retaliate  
 8 against him if he filed a grievance.”).

9 Plaintiff’s objection is unavailing. The R&R clearly considered Plaintiff’s affidavit—  
 10 both Plaintiff’s response and affidavit are referenced and cited throughout the R&R. (See Dkt.  
 11 No. 19 at 6, 8.) Further, the R&R does not impermissibly rule on Plaintiff’s state of mind. The  
 12 R&R finds, based on the record, Plaintiff failed to fulfill his burden to “show that this there is  
 13 something in his case that made the existing remedies effectively unavailable to him.” (See *id.* at  
 14 4, 19.) The record shows Plaintiff continued to litigate claims of harassment against Defendant  
 15 Seeley in other matters even after his alleged threats and Plaintiff made more than 30 grievances  
 16 before filing suit after the alleged threats occurred. (See *id.* at 6, 8–9.)

17 Plaintiff also objects to his case being dismissed with prejudice. The R&R recommends  
 18 dismissal with prejudice because “it is clear that the time for pursuing his administrative  
 19 remedies with respect to the claims asserted herein has passed[.]” (*Id.* at 10.) Plaintiff argues  
 20 dismissal without prejudice is nonetheless required because, in theory, he could re-file his case  
 21 after pursuing grievances or file his action in state court. (Dkt. No. 21 at 2–3) (citing *O’Guinn v.*  
 22 *Lovelock Correctional Center*, 502 F.3d 1056, 1059 (9th Cir. 2007) and *Ford v. Johnson*, 362  
 23 F.3d 395, 401 (7th Cir. 2004)). *Ford* is not binding in this circuit and Plaintiff’s case is  
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1 distinguishable from *O'Guinn*. The plaintiff in *O'Guinn* had sufficient time to exhaust his  
2 Americans with Disabilities Act and Rehabilitation Act claims when the case was dismissed,  
3 whereas exhaustion has been unavailable to Plaintiff even before issuance of the R&R.

4 **II. ORDER**

5 Accordingly, having reviewed the Report and Recommendation of the Honorable S. Kate  
6 Vaughan, United States Magistrate Judge, any objections and responses, and the remaining  
7 record, the Court finds and ORDERS:

- 8 (1) The Court ADOPTS the Report and Recommendation (Dkt. No. 19).
- 9 (2) Defendants' motion for summary judgment (Dkt. No. 9) is GRANTED;
- 10 (3) Plaintiff's amended complaint (Dkt. No. 1-4) and this action are DISMISSED with  
11 prejudice based upon Plaintiff's failure to comply with the exhaustion requirement of  
12 41 U.S.C. § 1997e(a).
- 13 (4) Plaintiff's motion to supplement his response (Dkt. No. 13), and Plaintiff's motion for  
14 leave to file a surreply (Dkt. No. 17), are DENIED.
- 15 (5) The Clerk is directed to send copies of this Order to Plaintiff, to counsel for  
16 Defendants, and to the Honorable S. Kate Vaughan.

17 Dated this 26th day of January, 2023.

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David G. Estudillo  
United States District Judge